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October 3, 2006

The Honorable Clifford W. Taylor
Chief Justice
Michigan Supreme Court
Clerk's Office
P.O. Box 30052
Lansing, MI 48909

Dear Chief Justice Taylor:

Re: ADM File No. 2005-19
Proposed Amendment of Rules 2.512, 2.513 of the Michigan Court Rules

As the Attorney General, I serve as the State of Michigan's exclusive legal advisor.[1] Michigan courts have observed it is the function and duty of the Attorney General, and only the Attorney General, to provide legal representation and advice to all client State agencies and officers.[2] Additionally, as the Attorney General, I have the obligation to supervise all of the prosecuting attorneys throughout the State of Michigan regarding their duties in prosecuting crimes,[3] and I may, when the situation warrants, initiate and directly prosecute crime that occurs in any jurisdiction in our State.[4]

Because I take my duties very seriously, I write to express my concern regarding certain proposed amendments to the Michigan Court Rules (MCR). The proposed amendments may affect my statutory responsibility for representing the State, its agencies and officers in civil actions, as well as the statutory duty of this office and the county prosecutors throughout the State of Michigan in our responsibility for prosecuting crime that occurs in our State. Though I support the overall concept of the jury reform proposals and believe in many instances the proposals may increase juror attention and comprehension, some of the proposed amendments are impracticable and will only serve to delay and unduly burden the judicial process. Because the negative effect of these proposed changes and the potential for harm outweigh any benefit, I recommend against the following proposed changes.

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[1] See, MCL 14.28, 14.29, and 14.32.
[2] See, e.g., *Babcock v Hanselman,* 56 Mich 27, 28 (1885); *Jennings v State Veterinary Bd,* 156 Mich 417, 418 (1908); *Sprik v Regents,* 43 Mich App 178, 182 (1972); *Attorney General v Public Service Comm*, 243 Mich App 487, 504 (2000).
[3] MCL 14.30.
[4] *People v Herrick,* 216 Mich App 594, 602 (1996), citing *In re Lewis' Estate,* 287 Mich 179, 183-184 (1938). See also MCL 14.28.

Rule 2.512 Instructions to Jury

(A) Request for Instructions

(5) The court need not give the statements of issues or theories of the case in the form submitted if the court presents to the jury the material substance of the issues and theories of each party.

Comments:

If submitted issues or theories of the case are accurate and based on the evidence, the trial court should rule them admissible and read them as presented. The trial court is always free to encourage changes, and this keeps the trial court out of the presentation of the case. Unless clearly prejudicial and legally erroneous, the parties' statement of issues or theories of the case should be read as written, otherwise there is a danger of prejudice and misinterpretation.

Rule 2.513 Conduct of Jury Trial

(D) Interim Commentary. Each party may, in the court's discretion, present interim commentary at appropriate junctures of the trial.

Comments:

The proposed amendment fails to establish any parameters and is subject to abuse and unnecessary delay in the trial. The proposed amendment creates a series of mini-closing arguments throughout the trial. It is more likely that such commentary will be treated by the jurors as evidence and not argument. Jurors should be allowed to analyze the evidence presented as free as possible from outside influence. The proposed amendment will be disruptive and confusing to the jury, distracting the jurors from the issues. Closing arguments are the appropriate juncture for attorney commentary, and this should be sufficient. If such a proposal is to be adopted, it should be limited to unique and complex litigation only. See, e.g. *Consorti v Armstrong World Industries,* 72 F 3d 1003 (CA 2 1995), referenced in the commentary, which involved consolidated multi-party asbestos litigation cases.

(E) Reference Documents. The court must encourage counsel in civil and criminal cases to provide the jurors with a reference document or notebook the contents of which should include, but which is not limited to, witness lists, relevant statutory provisions, and, in cases where the interpretation of a document is at issue, copies of the relevant document. The court and the parties may supplement the reference document during trial with copies of the preliminary jury instructions, admitted exhibits, and other appropriate information to assist jurors in their deliberations.

Comments:

This proposal with some modification will assist the jury to fully see and deliberate over all the evidence in the case and to apply that evidence to the applicable law. This would require

attorneys to better develop their theory of the case and to be more concise in their prosecution of the evidence. However, including potential witness lists is of no assistance and may only be confusing. Witnesses may change throughout the course of trial due to strategy, and the failure to call certain listed witnesses may prove to be confusing and prejudicial. Additionally, any evidence or instructions that are included should only be done after rulings have been made in admissibility and appropriateness of the material.

(F) Deposition Summaries. Where it appears likely that the contents of a deposition will be read to the jury, the court should encourage the parties to prepare concise, written summaries of the depositions for reading at trial in lieu of the full deposition. Where a summary is prepared, the opposing party shall have the opportunity to object to its contents. Copies of the summaries should be provided to the jurors before they are read.

Comments:

Though well intentioned, the proposed amendment is impractical and will only lead to unnecessary delays in trial along with claims of reversible error on appeal. Advocacy is the art of maintaining a jury's attention and assisting jurors in understanding the context of all evidence. The proposed amendment will inevitably lead to lawyers "spinning" deposition testimony. To the extent a jury will rely on out-of-court testimony, the juror should see or hear the written words as they were spoken by the deponent, or, better yet, the jurors should be able to see or hear the actual excerpt from the deposition. The rule as proposed will inevitably create error and a potential ground for appeal based on the deposition not being fairly presented to the jurors.

If the parties cannot agree on some form of summary, then none should be allowed. Otherwise, the trial court judge would essentially become a trier of fact by settling the contents of the summary. Banning the use of summaries absent consent of all parties properly takes the court out of the presentation of the case and prevents any unnecessary delay in the trial judge having to read lengthy transcripts before making a decision. Parties can summarize the testimony during closing argument.

(G) Scheduling Expert Testimony. The court may, in its discretion, craft a procedure for the presentation of all expert testimony to assist the jurors in performing their duties. Such procedures may include, but are not limited to:

(3) providing for a panel discussion by all experts on a subject after or in lieu of testifying. The panel discussion, moderated by a neutral expert or the trial judge, would allow the experts to question each other.

Comments:

I oppose any use of a panel discussion by experts on a subject after or in lieu of testifying. Once again, advocacy is the art of having a proponent's witnesses given credence and diminishing that given to the witnesses for the other side. A trial is not a television talk-show episode opening up a topic to be given free discussion. It is difficult to imagine that the panel discussion will lead to a definitive answer on the subject and the potential that the panel or jury

may be swayed by an expert with a strong personality is great. Such a procedure would magnify the importance of an expert who is a good debater and lead to a preference for style over substance. Attention and focus should be drawn to the presentation of the entire case, not just a battle of whose expert is better. This format often does not contribute to flushing out a clear perspective of positions and will only serve to confuse the jury and delay the trial process.

(K) Juror Discussion. After informing the jurors that they are not to decide the case until they have heard all the evidence, instructions of law, and arguments of the counsel, the court may instruct the jurors that they are permitted to discuss the evidence among themselves in the jury room during trial recesses. The jurors should be instructed that such discussions may only take place when all jurors are present and that such discussions must be clearly understood as tentative pending final presentation of all evidence, instructions, and argument.

Comments:

Maintaining an open mind until all sides have been fully heard may be an idealistic and difficult goal to achieve, but it is a proper one. Allowing the jury to deliberate on less (perhaps substantially less) than the whole story encourages the proverbial "rush to judgment" and is counter to our system of justice. M Civ JI 2.06 currently tells jurors they cannot discuss the case until they have been instructed on the law and begin to deliberate. Further, M Civ JI 2.05 instructs jurors to maintain an open mind until all evidence is in, they have been instructed on the law, and they have heard closing arguments.

Michigan courts and almost all states have held that the practice of allowing jurors to discuss the evidence among themselves encourages the jury to give premature consideration to evidence without being fully instructed on rules such as the burden of proof, presumption of innocence, and suspending judgment until all evidence has been presented.[5] This rule has been strictly enforced, especially in criminal cases.[6]

Recess discussions might result in jurors' positions becoming so hardened against a party that jurors will fail to listen and observe with impartiality throughout the complete evidentiary presentation stages of trial. Such juror predispositions or attitudes make it more difficult for the full complement of jurors to reach a verdict based upon reasonable assessment of the evidence. Worse yet, one juror could change another juror's interpretation of the credibility of a witness while that witness is still testifying. The integrity of the trial process requires the jurors to wait until all evidence has been presented before the finders of fact make up their minds. The potential harm of this proposed rule outweighs any benefit.

(M) Comment on the Evidence. After the close of the evidence and arguments of counsel, the court may fairly and impartially sum up the evidence and comment to the jury about the weight of the evidence, if it also instructs the jury that it is to determine for itself the

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[5] *Hunt v Methodist Hospital,* 240 Neb 838; 485 NW 2d 737 (1992).
[6] *People v Hunter,* 370 Mich 262 (1963).

weight of the evidence and the credit to be given to the witnesses and that jurors are not bound by the court's summation or comment. The court shall not comment on the credibility of witnesses or state a conclusion on the ultimate issue of fact before the jury.

Comments:

It should be left to the parties to sum up the evidence. Great prejudice can result to a party in a case where the jury believes, correctly or incorrectly, that the trial court is leaning one way or the other. The persuasiveness of a judge's comments cannot be minimized. The judge is perceived as an authority figure by most jurors. It is the province of the advocate to present a closing argument. Judges should not become involved in the advocacy process. The jurors may give greater weight to what the judge says than the attorneys in closing arguments or to what they remember from the trial. The potential disputes and subsequent appeals as to whether the judge's summary and comments meet the standard of fairness and impartiality outweigh any benefit.

Thank you for your time and consideration.

Sincerely yours,

Michael A. Cox
Attorney General